Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 24,
*Petitioner,*

v.

DENNIS W. SCHOONOVER,
*Respondent.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did the Sixth Circuit majority apply a negligence standard incompatible with decisions of this Court and other Courts of Appeals in sustaining a union's liability for breach of the duty of fair representation based on the union's failure to retain an expert witness and other perceived "mistakes" in handling a member's grievance?

2. Did the Sixth Circuit majority apply a standard incompatible with decisions of this Court in sustaining union liability for a breach of the duty of fair representation based on a determination that it was merely "conceivable" that different measures by the union would have produced a result favorable to the grievant in the arbitration proceeding?

## LIST OF PARTIES

In additon to the parties listed in the caption, the parties in this action include Consolidated Freightways Corporation.

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INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 24,
*Petitioner,*

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DENNIS W. SCHOONOVER,
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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

---

## PETITION FOR A WRIT OF CERTIORARI

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Petitioner, Local 24 of the International Brotherhood of Teamsters, respectfully prays that a writ of certiorari issue to review a judgment and opinion of a divided panel of the United States Court of Appeals for the Sixth Circuit.[1]

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, rendered on June 19, 1998, is reported at 147 F.3d 492 (6th Cir. 1998). Appendix A (A. 1a-12a). Petitions for rehearing and suggestions for rehearing *en banc* by Petitioner Local 24 and Consolidated

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[1] The case was decided by opinion of Circuit Judge Merritt for a majority composed of himself and Circuit Judge Boggs over the dissenting opinion of Circuit Judge Kennedy.

were denied August 7, 1998. Appendix B (A. 13a-14a). The opinion of the United States District Court for the Northern District of Ohio denying Local 24's and Consolidated's post-verdict motions for judgment is unpublished. Appendix C (A. 15a-17a).

## JURISDICTION

The district court had jurisdiction of this action pursuant to 29 U.S.C. § 185(c) and 28 U.S.C. § 1337. Final judgment was entered by the district court on February 26, 1996. Motions by Local 24 and by Consolidated for judgment as a matter of law were denied by the district court on May 3, 1996. Local 24 and Consolidated appealed pursuant to 28 U.S.C. § 1291. The Court of Appeals issued its decision and filed its opinion on June 19, 1998. Local 24 and Consolidated filed timely petitions for rehearing and suggestions of rehearing *en banc* which were denied on August 7, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

Section 301(a) of the Labor-Management Relations Act of 1947 provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

## STATEMENT OF THE CASE

This is a hybrid suit under § 301 of the Labor-Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185, and the statutory duty of fair representation

("DFR"). Respondent Dennis W. Schoonover claimed (1) that Consolidated Freightways Corporation ("Consolidated") wrongfully discharged him in violation of its collective bargaining agreement, and (2) that Petitioner, Local 24 of the International Brotherhood of Teamsters, violated its duty of fair representation ("DFR") by mishandling his ensuing grievance before a Joint Arbitration Panel, primarily through the union's tactical decision not to retain an expert witness.

The district court entered judgment against Local 24 and Consolidated on a jury verdict in the amount of $850,000. Applying legal standards incompatible with decisions of this Court and other courts of appeals, the Sixth Circuit affirmed. The Sixth Circuit majority determined that, in handling Schoonover's grievance, Local 24 made "mistakes"—first and foremost, its tactical judgment not to retain an expert—but for which it was "certainly conceivable" that the Joint Arbitration Panel would have upheld Schoonover's grievance. A. 7a.

As explained below, the case presents significant issues regarding both the proper scope of the duty of fair representation—particularly whether a tactical decision not to use an expert at a grievance hearing may be held to violate the duty—and the conditions under which breach of the DFR may be held to have tainted the arbitration process so as to defeat the finality of the arbitration result.

This Court has held that a union may be found to have breached its duty of fair representation "only when [its] conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 191 (1967). Unlike most others cases where DFR liability has been sustained, the record here contains no history of past differences between the union and Schoonover, and no hint of animosity towards him on the part of any union official. The Sixth Circuit majority's decision suggests no evidence of discrimination or bad faith by Local 24. Rather, the Sixth Circuit ma-

jority reasoned that Local 24's "mistakes" in handling Schoonover's grievance supported a finding that its representation had been "arbitrary", and hence violative of the DFR. What is especially unusual about this case is the Sixth Circuit majority's view that the union's tactical judgment not to retain an expert could be a basis for DFR liability.

In discharging Schoonover, Consolidated claimed that he intentionally broke the brake pedal of his assigned truck after displaying angry dissatisfaction with the condition in which it was provided to him for an extended over-the-road haul. A. 2a. As described by the Sixth Circuit majority, Consolidated suspected that Schoonover broke the pedal, using an extended tire iron, known in the industry as a "bud bar", which was present in the truck. A. 2a. Consolidated obtained a metallurgist's report, which it provided to the union upon discharging Schoonover and which it later submitted to the Joint Arbitration Panel. The report concluded that the pedal was fractured by application of an upward bending force exerted from beneath the pedal which, according to Consolidated, supported the company's suspicion. A. 3a. Before the Joint Arbitration Panel, Local 24 *inter alia* presented Schoonover's testimony that he had not broken the pedal and that it had instead broken spontaneously. However, the Joint Arbitration Panel voted unanimously to sustain Schoonover's discharge. A. 3a.

Central to Schoonover's DFR claim was his contention that Local 24 should have obtained the broken pedal pieces from Consolidated and had them examined by an independent expert in order to obtain an independent opinion. The Sixth Circuit majority found evidence supporting a finding that failure to retain an expert was a mistake. As observed by Judge Kennedy, however, the evidence was also undisputed that Local 24 made a tactical judgment not to retain an expert based on past negative experiences with experts and the fact that the union "could not secretly examine the pedal." A. 10a. More-

over, the evidence was undisputed that Local 24's officials made the judgment that Consolidated's metallurgical report would not fulfill its burden of proving that Schoonover intentionally broke the pedal. A. 10a.

The Sixth Circuit majority recognized that a team of Local 24 representatives, investigating the incident, had tried without success to replicate the fracture based on Schoonover's claim that the pedal could have broken due to pressure exerted from beneath the pedal by a "tie down device". A. 3a, 11a. As described by the Sixth Circuit majority, a Consolidated supervisor, Joe Sarne, then showed the union representatives how a pedal could be easily broken using a bud bar as the company claimed had occurred. A. 5a, 11a.

In addition to asserting that Local 24 should have engaged an expert, Schoonover claimed that Local 24 should also have attempted to replicate Sarne's demonstration; should have brought an actual truck to the arbitration hearing; and should have further investigated several brake pedal incidents involving Freightliner trucks which were produced by a different manufacturer than the International truck driven by Schoonover. A. 5a-6a.

Affirming the judgment of the district court, the Sixth Circuit perceived evidence that Local 24 made certain "mistakes" in its handling of Schoonover's grievance—first and foremost its decision not to present an expert. Writing for the majority, Judge Merritt determined that the jury permissibly found that Local 24 breached its DFR through these "mistakes" in handling Schoonover's grievance:

> Refusing to call a metallurgist, when the union representatives knew such testimony was crucial; failing to investigate similar incidents involving broken pedals, when that evidence could have convinced the arbitrators that Schoonover's incident was not as unsual as it appeared; crediting Consolidated's re-

> enactment of the incident, when an independent investigation would have revealed that Schoonover could not have broken the pedal with only a bud bar in the short time he was gone from the terminal; and neglecting to bring a truck to the hearing, when its presence would have allowed the grievance committee to test the company's version of the facts for themselves, are all substantial reasons which in combination, would justify the jury's finding that the union's representation of Schoonover was "arbitrary, discriminatory, perfunctory, or in bad faith."

A. 7a. Upholding the finding that Local 24's mistakes tainted the arbitration process, Judge Merritt declared:

> Without these *mistakes,* it is *certainly conceivable* that the grievance committee would have decided Schoonover's grievance differently.

A. 7a. (Emphasis added).

Judge Kennedy wrote in dissent:

> The majority finds that without the mistakes which the union representatives made, the jury could find that the grievance committee would have decided Schoonover's grievance differently. If the Union were held to a negligence standard, I would agree. But union representatives are not lawyers. They do not have the advantage of discovery procedures. At most, the Union's failures were negligence or bad judgment, neither of which is enough to constitute the breach of duty of fair representation.

A. 10a. On this basis, Judge Kennedy concluded that the Sixth Circuit majority's affirmance of the judgment for Schoonover conflicted with decisions of this Court which hold that negligence by a union cannot support liability for breach of the duty of fair representation. A. 9a, 10a.

## REASONS FOR GRANTING THE WRIT

### I. UPHOLDING LIABILITY OF A UNION BASED ON "MISTAKES" IN GRIEVANCE HANDLING IS CONTRARY TO DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS IN THAT IT APPLIES A LEGAL MALPRACTICE STANDARD OF NEGLIGENCE TO DETERMINING DFR VIOLATIONS

#### A. Application of a Negligence Standard Is Contrary to Decisions of This Court and Other Courts of Appeals

In affirming the liability of Local 24 for a breach of the DFR based on perceived "mistakes" in its handling Schoonover's grievance, the Sixth Circuit applied what amounts to a legal malpractice standard of negligence. Such a standard is incompatible with decisions of this Court and other courts of appeals.

Pervading this Court's decisions applying the DFR has been a recurring emphasis that the duty, while a necessary check on union power, is a *limited* one. This Court has emphasized that, to effectively carry out its assigned responsibilities under federal labor law, a union must be allowed a "wide range of reasonableness" in its representation of the bargaining unit as a whole. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). To that end, this Court declared in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976), that "[a] union is not liable for errors in judgment if they were made honestly and in good faith."

In *United Steelworkers v. Rawson*, 495 U.S. 362 (1990), this Court held squarely that mere negligence by the union cannot support DFR liability. This Court explained that the DFR, while an important check on arbitrary exercises of union power, is a "purposely limited check". *Id.* at 374. In *Airline Pilots v. O'Neill*, 499 U.S. 65, 78 (1991), this Court held that union behavior may

be disapproved as "arbitrary" only if it is so "wholly irrational" as to be outside the wide range of reasonableness prescribed by *Ford Motor Company*. 499 U.S. at 78. The Sixth Circuit's decision affirming DFR liability based on perceived "mistakes" is fundamentally at odds with *Ford Motor Co., Rawson* and *O'Neill*.

Application of what amounts to a legal malpractice standard for determining DFR liability also conflicts irreconcilably with decisions of other courts of appeals. For example, in *Peterson v. Kennedy*, 771 F.2d 1244, 1254 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986), the Ninth Circuit distinguished the standard for DFR from that for legal malpractice. The Ninth Circuit declared that it had:

> never held that a union . . . acted in an arbitrary manner where the challenged conduct involved the union's judgment as to how best to handle a grievance.

*Id.* at 1254. Contrary to the Sixth Circuit majority, the Ninth Circuit held that a union's conduct may not be deemed arbitrary:

> simply because of an *error* in evaluating the merits of a grievance, in interpreting particular provisions of a collective bargaining agreement, or *in presenting the grievance at an arbitration hearing.*

*Id.* (Emphasis added).

The Sixth Circuit majority in this case failed to pay so much as lip-service to this Court's pain-staking distinction between negligence by the union and conduct which is "so wholly irrational" as to permissibly support DFR liability. At no point did the Sixth Circuit majority even attempt to distinguish the "mistakes" it perceived from simple negligence. As emphasized by Judge Kennedy, the majority's conclusion that the record revealed "mistakes" in Local 24's handling of Schoonover's grievance reflects that the court in actuality applied a "negligence" standard in sustaining Local 24's liability.

This Court has not had occasion since its decision in *O'Neill* in 1991 to review the manner in which lower courts are applying the DFR so as to assure that unions are in fact afforded the wide range of reasonableness which the Court has prescribed. The Sixth Circuit majority's application of a legal malpractice standard to sustain DFR liability of Local 24 is incompatible with decisions of this Court and other courts of appeals and fully warrants this Court's review.

### B. Assigning DFR Liability for a Union's Failure to Retain an Expert Is Contrary to Decisions of Other Courts of Appeals

The specific question of whether a union's tactical decision not to retain an expert can support DFR liability, absent evidence of discrimination or bad faith, has not been considered by this Court. The question has been addressed in several court of appeals decisions. The Sixth Circuit majority's decision for the first time sustains DFR liability based on a union's tactical decision not to retain and present an expert witness in a grievance arbitration.

The Sixth Circuit majority's decision conflicts in this respect with recent decisions of the Eighth and Ninth Circuits in *Smith v. United Parcel Service, Inc.*, 96 F.3d 1066 (8th Cir. 1996), and *Patterson v. Teamsters Local 959*, 121 F.3d 1345 (9th Cir. 1997). Contrary to the decision of the Sixth Circuit majority, those decisions underscore the discretionary nature of the unions' decision whether or not to use an expert in support of a member's grievance.

In *Patterson*, the plaintiff claimed that the union breached its DFR *inter alia* by failing to present expert, medical evidence in support of his grievance. As occurred here, the union responded that it had made a strategic decision not to present such evidence based *inter alia* on concern that it "could have had an adverse effect on the arbitrator's view of [the plaintiff's] job performance."

*Id.* at 1349. The Ninth Circuit held that a union's "reasoned tactical decision not to present . . . medical evidence does not amount to a breach of the duty of fair representation." *Id.* at 1350.[2] Similarly, the Eighth Circuit in *Smith* declared that the decision whether to procure an expert witness "is a matter within the wide range of reasonableness afforded a union" in pursuing grievances on behalf of its members. 96 F.3d at 1069.[3]

A tactical decision not to use an expert cannot be found so "wholly irrational" as to support DFR liability consistent with *Rawson* and *O'Neill*.

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[2] Circuit Judge Noonan dissented from the Ninth Circuit's decision upholding summary judgment for the defendant union in *Patterson*, perceiving factual dispute over whether the union's decision not to present medical evidence was actually strategic. *Id.* at 1351. The Sixth Circuit majority, however, points to no evidence disputing the strategic character of Local 24's decision not to obtain an independent expert opinion. Schoonover introduced no evidence contesting the explanation provided in the testimony of Local 24's officers that their past experience with experts head been negative and that they were concerned that a second expert might support the opinion of Consolidated's expert. A. 10a.

[3] The Sixth Circuit itself held previously that a union's decision not to call an expert is "a discretionary decision for which [the union] cannot be found liable absent a bad or discriminatory purpose." *Walk v. P*I*E Nationwide, Inc.*, 958 F.2d 1323, 1329 (6th Cir. 1992).

Ironically, in *Woodruff v. Tomlin*, 616 F.2d 924, 930 (6th Cir. 1980) (*en banc*), the Sixth Circuit declared that *even lawyers* must be given broad discretion to make professional judgments, free from the chilling effect of being second-guessed and may not be held liable "based on an honest exercise of professional judgment." *See* G. Hazard & W. Hodes, *The Law of Lawyering*, § 1.1:201-1 (1998 Supp.). On the specific question relating to use of experts, the Sixth Circuit declared: "[i]n the absence of bad faith, . . . failure to consult an expert *cannot* be the basis of liability" for legal malpractice. 616 F.2d at 932.

## II. HOLDING AN ARBITRATION PROCESS TO HAVE BEEN TAINTED BASED ON EVIDENCE THAT DIFFERENT MEASURES BY THE UNION WOULD "CONCEIVABLY" HAVE CHANGED THE OUTCOME IN FAVOR OF THE GRIEVANT IS CONTRARY TO DECISIONS OF THIS COURT WHICH UPHOLD THE FINALITY OF THE ARBITRATION EXCEPT WHERE IT IS SHOWN THAT A BREACH OF DFR ACTUALLY HAD A SUBSTANTIAL IMPACT ON THE GRIEVANCE PROCEEDING

The Sixth Circuit majority's decision conflicts with the rigorous standard established by decisions of this Court for determining whether a grievance proceeding was tainted by a union's breach of the DFR. This Court has stated that "the impact of the Union's breach on the outcome of the grievance proceeding must have been substantial," and that a plaintiff "must meet the onerous burden of proving that the grievance process was 'seriously flawed by the Union's breach of its duty.' " *United Parcel Service v. Mitchell*, 451 U.S. 56, 61 (1981); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976). Unless this rigorous standard is satisfied, the arbitration outcome is final so as to bar a collateral claim of violation of the collective bargaining agreement.

The Sixth Circuit majority's ruling on the question of taint is in direct conflict with the standard established by this Court. The Sixth Circuit majority enunciated a lesser standard for taint by stating that, without Local 24's "mistakes":

> it is *certainly conceivable* that the grievance committee would have decided Schoonover's grievance differently.

A. 7a. (Emphasis added.)

Proof that a different result would be "conceivable"—or even "certainly conceivable"—is a far cry from the requisite proof that the impact of the union's breach was

shown in fact to have been substantial. The relaxed standard applied in this case allows DFR plaintiffs to substitute speculation as to what is *conceivable* for the rigorous proof that taint *actually occurred* which has heretofore been required by decisions of this Court.

## III. THE SIXTH CIRCUIT MAJORITY'S DECISION WILL INVITE A MULTITUDE OF DFR CHALLENGES BY LOSING GRIEVANTS TO UNION TACTICAL JUDGMENTS AND SUBSTANTIALLY UNDERMINE THE FINALITY AND UTILITY OF ARBITRATION

The panel majority's decision largely undoes this Court's painstaking efforts in *Rawson* and *O'Neill* to establish rules which in actuality afford unions a "wide range of reasonableness" in carrying out their representational responsibilities. Nowhere is this assurance more vital to successful collective bargaining than in connection with the myriad of difficult tactical judgments which are necessarily made by unions in the process of grievance handling. Local 24's performance could equally have been criticized had the tactical judgments suggested by the panel majority, *e.g.* to obtain an independent expert opinion or to bring an actual truck to the arbitration hearing, worked to Schoonover's detriment.

The panel majority's decision, exposing such tactical judgments to searching, hindsight scrutiny, will undermine grievance arbitration as a final and binding means for resolution of workplace disputes. The decision invites DFR suits by losing grievants that challenge union tactical judgments or claim that additional investigative measures should have been undertaken. It further fosters collateral attacks by allowing losing grievants to circumvent the finality of the arbitration process based on speculation that different tactical judgments could conceivably have worked to their benefit.

## CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted. The decision of the Sixth Circuit should be reversed. The matter should be remanded with the direction that judgment enter on behalf of Local 24.

Respectfully submitted,

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November 4, 1998

# APPENDICES

# APPENDICES

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

---

Nos. 96-3623/3624/3683

DENNIS W. SCHOONOVER
(96-3623),
*Plaintiff-Appellee/*
*Cross-Appellant,*

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE (96-3624) and LOCAL 24, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA (96-3683),
*Defendants-Appellants/*
*Cross-Appellees.*

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Appeal from the United States District Court
for the Northern District of Ohio at Cleveland
No. 88-01447—George W. White, Chief District Judge

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Argued: February 5, 1998
Decided and Filed: June 19, 1998

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OPINION

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Before: MERRITT, KENNEDY, and BOGGS, Circuit Judges.

MERRITT, Circuit Judge. In this hybrid lawsuit brought under 301 of the Labor Management Relations Act, 29 U.S.C. 185, Defendants Consolidated Freightways Corporation and Teamsters Local 24 challenge the sufficiency of the evidence supporting a $850,000 jury verdict for Plaintiff Dennis Schoonover. This is a fact-intensive case in which the applicable legal standards are well settled. The basis for the defendants' appeal is that the District Court erroneously denied their motions for judgment as a matter of law. In a separate appeal, Schoonover contends the District Court improperly prevented him from presenting expert testimony on rebuttal as well as proof of pain, suffering, and punitive damages. Because the record contains ample evidence to support liability under 301, we affirm the jury's verdict against the defendants. We also conclude the District Court's evidentiary decisions were within its discretion and therefore reject Schoonover's assignments of error.

Dennis Schoonover was a truck driver for Consolidated. He was discharged for intentionally destroying company property, specifically the brake pedal of the tractor he was driving to Milwaukee. On the day in question, the pedal broke off within twenty-five minutes of Schoonover's departure from the terminal. Consolidated claimed that Schoonover broke the pedal in retaliation against his supervisors for making him drive a "piece of junk." His supervisors believed that he had used a long tire iron (or "bud bar") to pry the pedal off so that he could drive a different rig to Milwaukee. They reached this conclusion by prying the pedal off another tractor in this manner. Schoonover, on the other hand, vehemently denied breaking the pedal. According to him, when he went to put on the brakes at the first major intersection on his route, the pedal was lying on the floorboard in two pieces. This story was corroborated by another truck driver who saw

Schoonover perform an emergency stop at this intersection, which would be consistent with a normal brake failure. Schoonover speculated that the brake tie-down mechanism, which holds the pedal down while the driver checks the brake system, could have caused the pedal to break. Purportedly, the tie-down could have lodged under the pedal, causing it to snap off when a driver depressed the brake, or it may have caused cracks in the die-cast metal by repeatedly allowing the pedal to snap back into place after a driver disengaged it.

After a hearing, Consolidated fired Schoonover for "blatant and intentional abuse of company equipment." The union subsequently filed a grievance on Schoonover's behalf. Pursuant to the collective bargaining agreement between the Teamsters and Consolidated, the case went to arbitration before the Ohio State Grievance Committee. Although Consolidated presented expert testimony from a metallurgist who testified that the pedal was broken by upward pressure, Schoonover's union representatives chose not to rebut this evidence with their own expert testimony. The arbitration committee denied Schoonover's grievance and sustained his discharge.

Schoonover then filed this federal lawsuit against Consolidated for violating the collective bargaining agreement and Teamsters Local 24 for breaching its duty of fair representation. The case went to trial. At the close of Schoonover's case the District Court granted the defendants' motion for judgment as a matter of law on grounds that the complaint was time-barred. This Court reversed, holding that the six-month statute of limitations for hybrid 301 actions did not begin to run until the arbitration panel's decision was reduced to writing. Schoonover v. Consolidated Freightways Corp. of Delaware, 49 F.3d 219 (6th Cir. 1995). The case then proceeded to a second trial upon remand. At the conclusion of all the evidence, the defendants again moved for judgment as a matter of law, arguing Schoonover had failed to establish a prima facie case. The District Court denied the motion.

The jury returned a verdict in favor of Schoonover and awarded him $850,000 in damages, finding Consolidated liable for 65 percent of the damages and the Teamsters Local for 35 percent. The defendants both renewed their motions for judgment as a matter of law, which the District Court also denied in a brief written opinion. The defendants' appeal challenges the District Court's denial of their motions for judgment as a matter of law before and after the verdict.

In order to overturn the jury's verdict on grounds that the District Court improperly denied them judgment as a matter of law, the defendants must show the evidence against Schoonover was so overwhelming that no one could reasonably find in his favor. Black v. Ryder/P.I.E. Nationwide, Inc., 970 F.2d 1461, 1470 (6th Cir. 1992). In other words, unless this Court "is left with the definite and firm conviction that a mistake resulting in plain injustice has been committed," or unless the verdict "is contrary to all reason," we must affirm the jury's verdict. Id. On review, this Court cannot weigh the evidence, determine credibility, or substitute its judgment for that of the jury. Instead, we must view the evidence and all reasonable inferences in Schoonover's favor. Id.

At trial, Schoonover presented evidence which, if believed, suggested that his supervisors at Consolidated set him up and then fabricated evidence to assure his dismissal. He testified that prior to his incident one of his supervisors had threatened him, precipitating a number of unfounded warning letters against him. This served as the background to what Schoonover depicted as a concerted effort by his superiors to run him off. The evidence indicated that his supervisors were convinced he had broken the pedal out of spite and thus went in search of ways to confirm their suspicions. A number of witnesses testified that when the company reenacted the incident for the union, a supervisor had doctored the pedal to make it look like Schoonover could have easily broken

the pedal with a bud bar in the short time he was gone from the terminal. In fact, Schoonover's attorney played the jury a videotape he stumbled upon in discovery, which showed several Consolidated representatives struggling for over two hours to break an identical pedal. Apparently these representatives discovered that the die-cast metal pedal could only be broken with the leverage provided by a wooden block, which Schoonover did not have in his cab. Moreover, although the testimony of Consolidated metallurgist appeared invulnerable at the arbitration hearing, the trial disclosed that Consolidated had only asked the expert to determine the direction of the break, not its possible causes. Consolidated's own expert admitted at trial that the pedal could have broken either from a prying force applied from above or from an object, such as the tie-down mechanism, lodged underneath. In addition, Schoonover's expert metallurgist presented trial testimony that the pedal contained structural defects which the company's expert had overlooked.

Schoonover also presented evidence suggesting that the union never took his grievance seriously and thus provided him inadequate representation at his grievance committee hearing. His theory of the case was that after Consolidated presented its doctored reenactment of the incident to the union, his union representatives gave up on his grievance. One of the union officials involved in the investigation testified that the reenactment was so convincing that the union never confirmed the company's version of events or even tried to pry a pedal off with a bud bar. Although his union delegates knew that the company had hired a metallurgist to provide expert testimony on the decisive issue at the hearing, they did not hire their own expert or even interview the company's expert. In fact, Schoonover's representative at his discharge hearing testified that cases involving destruction of company property are the hardest to resolve and often turn on expert testimony. This representative also admitted that the union could and should have brought a truck to

the hearing to show the arbitrators how difficult it is to actually break a pedal with a bud bar. Furthermore, Schoonover showed that he provided the union with a list of drivers who had experienced similar incidents, but the union did not pursue these leads when it learned the incidents occurred in tractors made by a different manufacturer. Two of these drivers provided trial testimony that the die-cast metal pedals in their trucks were similar to the one in Schoonover's truck and that the metal had either cracked or broken in half. Ultimately, the court admitted substantial evidence suggesting the union's representation of Schoonover at the arbitration hearing was perfunctory. Testimony revealed that the union only met with Schoonover once the Sunday before the hearing, that its presentation at the hearing only lasted fifteen minutes, and that its representatives apparently made little effort to rebut the company's evidence. This apparently left Schoonover to ask the grievance committee merely to believe his side of the story.

After weighing this evidence, the jury found that Consolidated breached the collective bargaining agreement and that the Teamsters Local breached its duty of fair representation. In a special verdict, the jury found Consolidated's termination of Schoonover was a breach of its contract with the union. Further, the jury determined the Teamsters Local breached its duty of fair representation to Schoonover in the grievance and arbitration procedures. Finally, the jury decided the union's breach tainted the hearing in such a way that the arbitration committee would have reached a different result without the breach. These findings specifically trace the requirements for liability in a hybrid 301 case. See Black v. Ryder/P.I.E. Nationwide, Inc., 15 F.3d 573, 585 (6th Cir. 1994). On the defendants' requests for postjudgment relief, the District Court concluded the evidence was sufficient and found the jury's verdict reasonable.

Viewing the evidence in the light most favorable to Schoonover, we believe the jury's verdict was is not "con-

trary to all reason" or based on a "mistake resulting in plain injustice." See Black, 970 F.2d at 1470. In hybrid 301 cases, the focus is on "whether . . . the employer breached the contract and whether there is substantial reason to believe that a union breach of duty contributed to the erroneous outcome of the contractual proceedings." Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 568 (1976). This jury could have reasonably concluded that Consolidated breached the contract when its employees doctored the pedal they used to reenact the incident for the union. The videotape, showing that the pedal was not as easy to break as Consolidated made it appear, was strong circumstantial evidence for Schoonover's theory that his supervisors set him up. The jury could have also found that the Teamsters Local breached its duty of fair representation to Schoonover in the way it handled his grievance. Refusing to call a metallurgist when the union representatives knew such testimony was crucial; failing to investigate similar incidents involving broken pedals, when that evidence could have convinced the arbitrators that Schoonover's incident was not as unusual as it appeared; crediting Consolidated's reenactment of the incident, when an independent investigation would have revealed that Schoonover could not have broken the pedal with only a bud bar in the short time he was gone from the terminal; and neglecting to bring a truck to the hearing, when its presence would have allowed the grievance committee to test the company's version of the facts for themselves, are all substantial reasons which, in combination, would justify the jury's finding that the union's representation of Schoonover was "arbitrary, discriminatory, perfunctory, or in bad faith." Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1355 (6th Cir. 1989); see also Vaca v. Sipes, 386 U.S. 171, 190 (1967). Without these mistakes, it is certainly conceivable that the grievance committee would have decided Schoonover's grievance differently.

Our review of the record has failed to produce any definite or firm conviction that the defendants have suf-

fered any injustice from the verdict. This record contains ample evidence from which the jury could have concluded that Consolidated breached the collective bargaining agreement, that the Teamsters Local breached its duty of fair representation, and that this breach tainted the outcome of the hearing before the grievance committee. We conclude the evidence sufficiently supports liability in a hybrid 301 case, see Black, 15 F.3d at 585, and therefore affirm the jury's verdict. As for Schoonover's cross-appeal of the decision to exclude his expert's testimony on rebuttal and his evidence of punitive damages, we conclude the District Court acted within its discretion. See Benedict v. United States, 822 F.2d 1426, 1428-29 (6th Cir. 1987); Wilson v. Int'l Bhd. of Teamsters, 83 F.3d 747, 754-55 (6th Cir. 1996). Accordingly, the judgment of the District Court is affirmed.

## DISSENT

KENNEDY, Circuit Judge, dissenting. Because the evidence, even in the light most favorable to plaintiff, does not permit a finding that the Union acted "in such a discriminatory, dishonest, arbitrary or perfunctory fashion as to breach its duty of fair representation," the standard set in DelCostello v. Int'l Brotherhood of Teamsters, 462 U.S. 151, 164 (1983), I respectfully dissent.

There are three distinct ways in which a union can breach the duty of fair representation: by taking actions that are arbitrary, discriminatory or in bad faith. Black v. Ryder/P.I.E. Nationwide, Inc., 15 F.3d 573, 584 (6th Cir. 1994). Negligence fails to satisfy any prong of this tripartite standard. Dushaw v. Roadway Express, Inc., 66 F.3d 129, 133 n.1 (6th Cir. 1995) (citing United Steelworkers of America v. Rawson, 495 U.S. 362, 372-73 (1990)). A plaintiff seeking to establish a union's breach of the duty of fair representation is met with an "onerous burden." Black, 15 F.3d at 585. A union's action will be found arbitrary only if "the union's behavior is so far outside a 'wide range of reasonableness' . . . as to be irrational." Air Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 67 (1991).[1] A plaintiff also must show that any breach more likely than not tainted the grievance procedure, substantially affecting the outcome. Dushaw, 66 F.3d at 132 (citing Black, 15 F.3d at 585). The record reflects that the Union investigated the brake pedal incident; followed leads as to other brake pedal fractures; interviewed and took the statement of the only

[1] Plaintiff argues that O'Neill's "wholly irrational" standard is inapplicable to grievance proceedings because O'Neill involved contract negotiations. We rejected this argument in Walk v. P*I*E* Nationwide, Inc., 958 F.2d 1323, 1326 (6th Cir. 1992). (O'Neill's standards apply to both contract negotiations and grievance proceedings).

eyewitness to the incident; and pursued, considered and tested theories consistent with plaintiff's denial that he did not intentionally break the pedal.

The majority finds that without the mistakes which the union representative made, the jury could find that the grievance committee would have decided Schoonover's grievance differently. If the Union were held to a negligence or a malpractice standard, I would agree. But union representatives are not lawyers. They do not have the advantage of discovery procedures. At most, the Union's failures were negligence or bad judgment, neither of which is enough to constitute the breach of duty of fair representation. Walk v. P*I*E Nationwide, Inc., 958 F.2d 1323, 1326 (6th Cir. 1992) ("[S]imple negligence or mere errors in judgment will not suffice.")

The majority points to four deficiencies in the Union's handling of the grievance to support the jury's verdict. First, the Union's failure to have the pedal examined by a metallurgist. The Union made what could now appear to be the erroneous decision to refrain from hiring its own expert to discern how the pedal was broken. The Union had had two prior experiences in which consulting an expert had worked to the detriment of an employee. The Union could not secretly examine the pedal. The Union decided to base its position at the grievance proceeding on plaintiffs' denial and to argue that Consolidated could not prove plaintiff intentionally fractured the brake pedal. The Union's decision may well have been a mistake but it was neither perfunctory nor arbitrary. It was based on prior unsatisfactory experiences with experts. The expert's report merely stated that the fracture was caused by an upward force, a conclusion with which both experts at trial agreed. The decision not to have the brake pedal examined by a metallurgist cannot be said to be outside the range of reasonableness.

The second reason given by the majority is "failing to investigate similar incidents." Plaintiff provided the Union

with information about incidents in other locations where brake pedals failed. The Union contacted local union presidents in those locations as well as various drivers. It learned that the failures were in Freightliner trucks, which have different brake systems and were due primarily to flaws in floorboard and pedal mountings.[2] Even with all the discovery, the trial did not produce similar incidents.

Third, the majority states that the Union should not have credited Consolidated's re-enactment of the incident, but should have made an independent investigation; that is, tried to break a pedal with a bud bar itself. While in hindsight that should have been done, the union representatives had observed Sarne break a similar pedal with a bud bar. While this was not the first time Sarne had tried to break a pedal and he had had trouble breaking one until he learned where to put the bud bar, he broke this one on his first attempt in the union representative's presence. While they were unaware of his earlier practice attempts, still he did break it with ease. The union representatives had tried, without success, to see if the tie back bar could cause the pedal to break. While the Union might have established that it was difficult to break the pedal with a bud bar, there is no suggestion in the record that it cannot be done. The Union did not have the ready access to trucks for destructive tests that the employer did. It did not own trucks on which it could experiment at will.

Finally, the majority finds the Union breached its duty of fair representation by not bringing a truck to the hearing where the grievance committee could test the com-

[2] Had the Union investigated Navistar brake failures further, it would have learned that Navistar had no record of any similar fracture problem with any other international pedals. While plaintiff at trial produced evidence of other brake failures, he produced no evidence of any other similar failure of an International pedal.

pany's version of the facts. In the earlier demonstration, the union representatives had observed a bud bar break the pedal. Whether to permit the grievance committee to conduct its own experiment or not seems to me to be a judgment call well within a wide range of reasonableness. The grievance committee members were all familiar with trucks.

Because the record does not support the jury's verdict that Local 24 acted arbitrarily, discriminatorily or in bad faith, and outside "a wide range of reasonableness," I believe the District Court erred in not granting the Union's motion for judgment as a matter of law.

**APPENDIX B**

[Filed Aug. 7, 1998]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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96-3623/3624/3683

DENNIS W. SCHOONOVER,
(96-3623),
*Plaintiff-Appellee,*
v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE (96-3624) and LOCAL 24, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA (96-3683),
*Defendants-Appellants.*

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ORDER

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BEFORE: MERRITT, KENNEDY, and BOGGS, Circuit Judges.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes the issues raised in the petitions were

fully considered upon the original submission and decision of the cases. Accordingly, the petitions are denied. Judge Kennedy would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

## APPENDIX C

[Filed May 3, 1996]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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Case No. C88-1447A
HON. GEORGE W. WHITE

DENNIS W. SCHOONOVER,
*Plaintiff,*

vs.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, *et al.*,
*Defendants.*

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## MEMORANDUM AND ORDER

This matter is before the Court upon the Motions for Judgment Notwithstanding the Verdict submitted by defendants, Consolidated Freightways (Dkt. #239) and Teamster Local No. 24 (Dkt. # 238). On February 23, 1996, a jury returned a verdict in favor of plaintiff, Dennis Schoonover, on his hybrid Section 301/Duty of Fair Representation claim.[1] Specifically, the jury found Consolidated violated the collective bargaining agreement; the union breached its duty of fair representation; and the union's representation of plaintiff had the probable effect of causing an erroneous outcome at the arbitration stage. *See* Jury Interrogatories (Dkt. #236).

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[1] Plaintiff's action arises under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 301.

The Sixth Circuit has stated that:

> The issue raised by a motion for a judgment notwithstanding the verdict is whether there is sufficient evidence to raise a question of fact for the jury. In determining whether the evidence is sufficient, the trial court may neither weigh the evidence, pass on the credibility of witnesses nor substitute its judgment for that of the jury. Rather, the evidence must be viewed in the light most favorable to the party against whom the motion is made, drawing from that evidence all reasonable inferences in his favor. If, after thus viewing the evidence, the trial court is of the opinion that it points so strongly in favor of the movant that reasonable minds could not come to a different conclusion, then the motion should be granted.

*Ratliff v. Wellington Exempted Village Schools Bd. of Ed.*, 820 F.2d 792, 795 (6th Cir. 1987) (citing *Morelock v. NCR Corp.*, 586 F.2d 1096, 1104-05 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979)).

This Court finds that the evidence was sufficient to raise a question of fact for the jury. Viewing the evidence presented at trial in a light most favorable to plaintiff, including the testimony concerning the matter in which the pedal could have broken and the conflicting testimony regarding Local No. 24's handling of the arbitration, the Court does not find the jury verdict to be unreasonable.

Moreover, defendants' argument that plaintiff's claims are barred by the applicable six month statute of limitations is without merit. The Sixth Circuit rendered an opinion on May 30, 1995 concerning this exact issue. *Schoonover v. Consolidated Freightways Corp. of Delaware, et al.*, No. 93-4147 (6th Cir. 1995). Although defendants assert that the subsequent trial has produced substantially different evidence such that the circuit court's ruling should no longer apply, this Court does not agree.

The Court finds that the evidence presented at trial did not alter the circuit court's underlying judgment.

Accordingly, defendants' Motions for Judgment Notwithstanding the Verdict are hereby *denied*.

IT IS SO ORDERED.

/s/ George W. White
GEORGE W. WHITE
Chief Judge
United States District Court